487c Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE AMERICAN BIRD CONSERVANCY, ENVIRONMENTAL DEFENSE, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, THE WILDERNESS SOCIETY, AND WORLD WILDLIFE FUND IN SUPPORT OF RESPONDENTS

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16 U.S.C. §1539(a)(1)(B) 17,29,30

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51 Federal Register 19926 *et seq.* (June 3, 1986) 12,13

ARTICLES

Terry Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin,* vol. 26, no. 6 at 10-11 (Nov./Dec. 1999), www.fws.gov/endangered/esb/99/11-12/1011.pdf 21

BOOKS

American Heritage Dictionary, 4th edition (2001) 6

Merriam Webster Pocket Dictionary (1994) 6

Michael Bean *The Evolution of National Wildlife Law* (1st ed. 1977) 18

Michael Bean & Melanie Rowland *The Evolution of National Wildlife Law* (3rd ed. 1997) 19

Webster's Third New International Dictionary (1966) 6

MISCELLANEOUS

Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act available at www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm 13,14,15

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Environmental Defense is a non-profit organization that represents over 500,000 members. Since 1967, Environmental Defense has linked science, economics, law, and private-sector partnerships to create solutions to many of the most serious environmental problems.

Amicus American Bird Conservancy ("ABC") is a U.S non-profit organization dedicated to the conservation of native wild birds and their habitats throughout the Americas. ABC works in partnership with a wide range of stakeholders from indigenous communities and private landowners, to corporations, government agencies, and other NGOs. ABC is incorporated in Delaware with over 7,000 members.

Amicus National Audubon Society, Inc. is a non-profit corporation organized under the laws of the State of New York, with its principal office at 700 Broadway, New York, New York 10003. National Audubon has more than 367,000 members, offices in 23 states, and a presence in all 50 states through more than 450 certified chapters and through its nature centers, sanctuaries, and education and science programs. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All parties other than the United States submitted letters to the Court consenting to the filing of all *amicus curiae* briefs. The consent of the United States has been filed with the clerk.

Amicus Natural Resources Defense Council ("NRDC") is a non-profit conservation organization incorporated under the laws of New York State. NRDC represents over 525,000 members nationwide, over 10,000 of whom live in Arizona. Through its litigation, scientific, and advocacy efforts, NRDC has long been active in efforts to protect endangered species, restore integrity to the earth's resources and establish sustainability and good stewardship of the earth.

Amicus Sierra Club is a non-profit corporation organized under California law, with more than 700,000 members in the United States. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

Amicus The Wilderness Society is a non-profit public interest membership organization headquartered in Washington, D.C. Founded in 1935, the Society and its approximately 250,000 members and supporters are dedicated to protecting a national network of wild lands and fostering an American land ethic. The Society works to ensure wise management and protection of America's public lands and the wildlife therein. The Society fulfills its mission through public education, analysis, and advocacy.

Amicus World Wildlife Fund ("WWF") has been protecting the future of nature for over 45 years. The largest multinational conservation organization in the world, WWF works in 100 countries and is supported by 1.2 million members in the United States and close to 5 million globally. WWF's unique way of working combines global reach with a foundation in science, involves action at every level from local to global, and ensures the delivery of innovative solutions that meet the needs of both people and nature.

Amici curiae and their members and supporters highly value rare wild plants and animals for their aesthetic, ecological, educational, historical, recreational, scientific, utilitarian, and other values. They have a special interest in the effective administration of Section 7 of the Endangered Species Act because of its important role in fostering efforts to reconcile the survival imperatives of rare species with other societal objectives.

SUMMARY OF ARGUMENT

In this case, the government contends that, in carrying out an action it characterizes as non-discretionary pursuant to a statute that was enacted prior to the Endangered Species Act ("ESA"), and that, not surprisingly, makes no mention of endangered species, a federal agency may disregard a requirement of the subsequently enacted ESA that, on its face, applies to "any action authorized, funded, or carried out by" a federal agency. That broad contention cannot be reconciled with either the plain language or the purpose of Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2). The plain language of Section 7(a)(2) applies to all actions "carried out" by federal agencies and requires such agencies to explore every available means of reducing the likelihood that such action will have a prohibited effect. Because the focus of Section 7(a)(2) encompasses the execution of actions, as well as the decisions to undertake those actions, and because the mandate of Section 7(a)(2) is both procedural and substantive, principles applicable to the interpretation of the National Environmental Policy Act ("NEPA") do not limit the application of Section 7(a)(2).

The government's contention would, moreover, frustrate the purposes of the ESA and render nugatory the interagency consultation process that Congress has repeatedly declared to be the intended – and largely successful – means of resolving apparent conflicts between the ESA's conservation goals and the objectives of other

laws. In doing so, it would foreclose the required careful consideration of all measures within the authority of the Environmental Protection Agency ("EPA") that could reduce the likelihood of a prohibited effect. Further, the government's contention improperly bypasses the Section 7 exemption process that Congress crafted to address the occasional, truly irresolvable conflicts between species survival imperatives and other agency responsibilities.

Although ESA implementing regulations limit the applicability of Section 7(a)(2) to federal actions in which there is "discretionary Federal involvement or control," consideration of their history compels the conclusion that they were intended to distinguish completed federal actions from actions over which a federal agency has ongoing, yet-to-be completed responsibilities. Finally, the government's broad contention, if accepted by the Court, would lead to problematic consequences whereby agencies carrying out putatively "non-discretionary" actions would be unable to secure relief from the prohibition against incidentally taking endangered species – relief readily available for other federal actions and for private and other non-federal actions.

ARGUMENT

I. THE PLAIN MEANING OF SECTION 7(a)(2) ENCOMPASSES EPA'S ACTION

A. Section 7(a)(2) Focuses Not Merely On Decisions To Act, But On How Those Actions Are Carried Out.

Section 7(a)(2) of the ESA requires "each federal agency" in consultation with the U.S. Fish and Wildlife

Service or National Marine Fisheries Service,[2] to "insure that any action authorized, funded, or carried out" by it "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of the critical habitat of any such species. EPA contends that this requirement does not apply to its transfer to a state of the authority to implement the National Pollutant Discharge Elimination System ("NPDES") permitting program in that state pursuant to Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. §1342.[3] More broadly, EPA contends that Section 7(a)(2) does not apply to any "non-discretionary" federal action. Even assuming *arguendo* that EPA's action here is non-discretionary, its contention is contrary to the plain meaning

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[2] The National Marine Fisheries Service is primarily responsible under the ESA for marine and anadromous species; the U.S. Fish and Wildlife Service is primarily responsible for all other species. Unless the context requires reference to a particular agency, they will hereinafter be referred to collectively as "the Service" or "the Services."

[3] In prior proceedings in this case regarding the transfer to Arizona, as well as when considering similar transfers to other states, EPA and the Service have taken the position that Section 7(a)(2) applies. Notwithstanding those earlier positions, EPA now maintains categorically that "there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies." Brief for Petitioner EPA ("EPA Br.") at 49 (quoting the Fish and Wildlife Service). This "clarification" of EPA's position took place *after* the decision of the Court of Appeals in this case, and occurred in the context of a transfer of NPDES authority to Alaska, the only state without a single freshwater endangered or threatened species. See http://ecos.fws.gov/tess_public/StateListing.do?state=all (visited March 18, 2007). In light of this irregular procedure and for reasons set forth at length in Respondents' brief, EPA's decision should be remanded for further proceedings consistent with the requirements of Section 7(a)(2).

of Section 7(a)(2) and misapprehends the focus of that provision.

The focus of Section 7(a)(2) is on "actions" and their implementation. It plainly seeks to influence how actions are "carried out" by federal agencies, and not simply the process by which decisions to act are made. EPA asserts that whenever a federal agency merely carries out a decision required by the terms of another statute, it is Congress that is responsible for the ensuing effects, not the agency. However, Section 7(a)(2) is clear on its face that it applies to any action "carried out" by a federal agency, even when that action is pursuant to a statute, like the Clean Water Act, that was enacted prior to the ESA and, not surprisingly, makes no explicit mention of endangered species.

Rather than imply a limitation to actions over which an agency has discretion, the ordinary meaning of the phrase "carried out" connotes a much broader reach. "Carry out" means "to put into execution" (*Webster's Third New International Dictionary*, 1966), "to bring to a successful conclusion" (*Merriam Webster Pocket Dictionary*, 1994), or "to follow or obey" (*American Heritage Dictionary*, 4th ed. 2001). A soldier, for example, "carries out" the order of an officer, though the soldier's action can hardly be characterized as discretionary. By the same token, an agency whose action simply effectuates a decision according to specified criteria nevertheless "carries out" that action. Thus, when EPA transfers NPDES authority to a state, it "carries out" an action clearly subject to Section 7(a)(2). This Court in *TVA v. Hill*, 437 U.S. 153, 186 n. 32 (1978) characterized its holding as "giv[ing] effect to the plain words of the statute, namely that §7 affects all projects which remain to be authorized, funded, or carried out." The plain meaning of Section 7 is no less clear today.

B. The Reach Of Section 7(a)(2) Is Not Circumscribed By Decisions Limiting the Reach of NEPA

Because Section 7(a)(2)'s primary focus in on how agency actions are carried out, it is fundamentally different from the National Environmental Policy Act ("NEPA"). NEPA requires an environmental impact statement to accompany "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). NEPA's focus is on the *decision-making process* of federal agencies. See *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 100 (1983) (NEPA requires a hard look at environmental effects and "that the 'hard look' be incorporated as part of the agency's *process of deciding whether to pursue* a particular federal action") (emphasis added). Section 7(a)(2) of the ESA, in contrast, reaches well beyond the "process of deciding whether to pursue" an action to the matter of how to implement that action (the "carrying out" of the action). It requires that in carrying out any action, a federal agency "insure" that it is unlikely to have any of the effects proscribed there.

This critical difference between the focus of Section 7(a)(2) and that of NEPA distinguishes this case from *Department of Transportation v. Public Citizen*, 531 U.S. 752 (2004). In *Public Citizen* the Court held that it was the President's decision to allow Mexican trucks to operate in the United States – not the Federal Motor Carrier Safety Administration's ("FMCSA") carrying out of one aspect of that decision – that, for NEPA's purposes, was most important. As a result, the Court in *Public Citizen* reasoned that no purpose would be served by requiring the FMCSA to assess the environmental impact of a decision that the President had already made. Unlike NEPA, which governs only the decision-making process, the duty to "insure"

imposed by Section 7(a)(2) clearly rests with the agency that "carries out" an action, and seeks to influence how that action is carried out, not just how it is decided upon.[4]

Moreover, the Services themselves explicitly rejected NEPA-derived limitations on the scope of Section 7 only months before this Court decided *TVA v. Hill*. In January 1978, they jointly promulgated regulations in which the only issue regarding the reach of Section 7 concerned its application to previously initiated, nearly completed federal actions. 43 Fed. Reg. 869 *et seq.* (Jan. 4, 1978). The Services expressly followed the decision of the Sixth Circuit in *Hill v. TVA*, 549 F.2d 1064, 1071-72 (1977), and rejected "the incorporation of the NEPA case law into the section 7 regulations." 43 Fed. Reg. at 872. Their rejection of NEPA precedent as controlling Section 7 was effectively endorsed by this Court in *TVA v. Hill*, in which Chief Justice Burger found that NEPA decisions "are completely inapposite," because NEPA and the ESA "serve different purposes," with NEPA's requirements being essentially procedural whereas Section 7's are substantive. 437 U.S. 153, 188 n. 34. The Services' regulations remained in effect when Congress amended the ESA in 1978, 1979, and again in 1982.

Keenly aware of this Court's conclusion that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," 437 U.S. at 194, Congress took no action to limit the reach of

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[4] Moreover, *Public Citizen* did not hold that NEPA was inapplicable to the actions of the Federal Motor Carrier Safety Administration, but only that the effects of those actions were not substantial enough to trigger the preparation of an environmental impact statement. By contrast, here the government argues that EPA's delegation decision – and every other putatively "non-discretionary" federal action – lies wholly outside the reach of Section 7(a)(2). Nothing in *Public Citizen* warrants that extension of its holding.

Section 7. Instead, its response in 1978 was to fashion a special process through which federal actions could be exempted from the requirements of Section 7 *after* they had undergone interagency consultation and been found to conflict with those requirements. Nothing Congress said or did when amending the ESA in 1978, 1979, or 1982, when its attention was squarely focused on Section 7's duty to "insure," suggests that it had any different view of the scope of that duty than the very one reflected in the 1978 regulations.

II. THE REFERENCE IN THE REGULATIONS TO "DISCRETIONARY FEDERAL INVOLVEMENT OR CONTROL" DISTINGUISHES COMPLETED ACTIONS FROM ONGOING ACTIONS

A. History Of The Regulations

EPA relies heavily upon a Service regulation stating that Section 7 applies "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. §402.03. That reliance is misplaced, for the history of the regulation shows that its only purpose was to distinguish completed from ongoing federal actions.

The question of Section 7's application to actions already under way when a species was listed arose soon after the ESA's enactment. It was at the core of the suit filed in 1976 to halt TVA's construction of Tellico Dam, which had been authorized by Congress a decade earlier and was estimated by TVA to be 70 to 80 percent complete when a recently discovered fish was listed in 1975. At the time, there were no regulations interpreting Section 7. Rather, the U.S. Fish and Wildlife Service on April 22, 1976, promulgated non-regulatory "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." They advised that when

> "considering whether section 7 applies to actions in the ... implementation stage ... Federal agencies should determine if ... substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species. If ... such work on a Federal project remains to be performed, then the requirements of section 7 should be satisfied."[5]

Weeks later, the district court decided *Hill v. TVA*, 419 F.Supp. 753 (E.D. Tenn. 1976). TVA had argued that it had no discretion to do anything other than complete the dam, "point[ing] out ... that the money appropriated to it was for the Tellico Project alone and that it had no authority to use the funds other than for that purpose." *Id.* at 760, n. 8. The court refused to enjoin completion of the dam, because "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result." *Id.* at 760.

Like the guidelines they replaced, the first regulations proposed to implement Section 7 applied it to all federal actions except those for which there was no "substantial work" remaining that would independently jeopardize the continued existence of a listed species. 42 Fed. Reg. 4868 *et seq.* (Jan. 26, 1977). Shortly after they were proposed, the Sixth Circuit rejected any exemption for previously initiated, nearly completed projects. *Hill v. TVA*, 549 F.2d 1964 (6th Cir. 1977). Before the Sixth Circuit, "TVA claim[ed] to

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[5] The 1976 guidelines were never published. The quotation here is taken from *Hill v. TVA*, 419 F.Supp. 753, 761 (E.D. Tenn. 1976).

have done everything possible to save the snail darter, short of abandoning work on the dam," which it asserted was "innately unreasonable." *Id.* at 1074. Relying upon NEPA decisions, TVA argued that "the terminal phases of ongoing projects" should not be considered "actions" subject to Section 7. *Id.* at 1070. Expressly rejecting the "NEPA cases which waive compliance based upon advanced project construction," the Sixth Circuit held that "continued work, directed toward impoundment, violates" Section 7. 549 F.2d at 1072.

The Services' final regulations in 1978 provided that "Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat." 50 C.F.R. §402.03, as set forth at 43 Fed. Reg. 869, 875 (Jan. 4, 1978). The final regulation was identical to those proposed a year earlier, but the Services made clear that they too now rejected NEPA analogies in determining Section 7's reach:

> "It was originally believed that retroactive situations under NEPA and the Act were analogous enough to warrant the incorporation of the NEPA case law into the Section 7 regulations."
>
> "The Sixth Circuit Court of Appeals in the recent case of *Hill v. TVA* ... specifically considered this analogy and rejected it. ... The Court noted that as long as some Federal discretionary control or involvement remained that could avoid jeopardizing the listed species or adversely modifying or destroying its critical habitat, the degree of completion of a project was irrelevant. In light of the Sixth Circuit Court of Appeal's analysis, therefore, the FWS and NMFS now reject the analysis of retroactivity in the proposed rulemaking's

> preamble and adopt the rationale of the Sixth Circuit."

43 Fed. Reg. at 872.

In 1983, the Services proposed an overhaul of their regulations implementing Section 7. 48 Fed. Reg. 29990 *et seq.* (June 29, 1983). Proposed §403.03 said: "Section 7 and the requirements of this Part apply to all actions in which there is Federal involvement or control." Like both the 1978 regulations and the 1976 guidelines, the proposed regulations drew no distinction between "discretionary" and "non-discretionary" actions. Nor did the proposed definition of "action," which included "all activities of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." See proposed §402.2, 48 Fed. Reg. at 29998. Thus, proposed §402.3 reaffirmed the longstanding view of the Services that – apart from completed actions – Section 7 applied without qualification or limitation to *all* federal actions.

The rulemaking initiated in 1983 yielded final regulations in 1986. 51 Fed. Reg. 19926 *et seq.* (June 3, 1986). Those regulations renumbered proposed §402.3 as §402.03 and inserted the word "discretionary" immediately before the phrase "Federal involvement or control.". Given that the proposed regulations, the 1978 final regulations, and the 1976 guidelines had not limited Section 7's applicability to actions in which there was "discretionary" federal involvement or control, one would have expected the Services to explain the intention behind the addition of this word, particularly if it was meant to effect a limitation beyond the established limitation covering completed actions. However, the Services said nothing on the matter. Instead, the entirety of the explanation offered for §402.03 was as follows:

> "This section, which explains the applicability of section 7, implicitly covers Federal

> activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of 'action' in §402.02. The explanation for the scope of the term 'action' is provided in the discussion under §402.01 above."

51 Fed. Reg. at 19937 This explanation addressed the quite different issue of the extraterritorial application of Section 7, and specifically it sought to make clear that the term "action" in §402.03 was limited to actions occurring in the territorial United States or on the high seas. Accordingly, it is far more plausible that the final regulations adopted in 1986 intended no departure from the settled understanding that Section a)(2) applies broadly to all yet-to-be completed federal actions, than that the Services intended a wholly new class of exempt activities for which they offered not a word of explanation.

B. Subsequent Interpretation By The Services

The conclusion from the foregoing history is consistent with how the Services appear to understand their own regulation in their jointly published *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act.*[6] With only two possible exceptions, whenever reference is made in the Handbook to "discretionary" federal actions, the context clearly applies to previously initiated, not yet completed, actions.[7]

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[6] www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm (visited March 22, 2007).

[7] See, *e.g.*, Handbook, page 2-15 ("water projects that predate the Act are subject to consultation if the agency retains any discretion in continuing project operations"); page 4-28 (discussing the types of analyses required

The only two occasions where the Handbook refers to "discretionary" federal actions more broadly provide little support for EPA's position here. In fact, the first reference appears to contradict that position:

> "The Act requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program)."

Handbook at 2-6. Rather than support EPA's position, this appears to say that "state operation" of the NPDES program, subject to retained federal oversight, is an action on which consultation is required. The other reference memorializes the Services' understanding of the holding in *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C.Cir. 1992):

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for "ongoing discretionary operations of Bureau [of Reclamation] and Corps of Engineers water facilities"); pp. 4-60, B-12, and B-32 (discussing requirement to reinitiate consultation on an ongoing project "where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law)"); pp. 6-5, B-16, and B-25 (discussing requirement to initiate formal consultation on action that was the subject of "conferencing" regarding a species that had been proposed for listing if, "prior to the completion of the action or while [the agency] still maintains any discretionary authority" the species is listed); page. B-48 (advising that no "reinitiation notice" need be included in the report that concludes the conferencing process for projects affecting species that are proposed to be listed "if discretionary Federal agency involvement has terminated"; and p. E-24 (Service project leaders have a "continuing responsibility to determine if discretionary ongoing activities of the Service" comply with the requirements of Section 7).

> "Annual operating permits issued prior to issuance of a new hydropower license are subject to the section 7 consultation if the Federal agency has discretion to determine the terms of the annual permits."

Handbook at 4-29. Closer examination, however, reveals that this memorialization of *Platte River* does not advance the government's position either.

In *Platte River*, certain dam licensees under the Federal Power Act were entitled to annual interim renewals of their expiring fifty-year licenses under the same terms as the original licenses until the Federal Energy Regulatory Commission ("FERC") could process a longer term renewal. The Handbook appears to regard this situation as an example of a completed federal action for which there is no remaining federal involvement that "in itself" could jeopardize a listed species. Thus, this single reference in the Handbook hardly stands for the broader proposition that the Services regard all non-discretionary federal actions as beyond the reach of Section 7(a)(2).

Whatever the Services' understanding of *Platte River* may be, an important distinction exists between the facts there and those here. *Platte River* noted that FERC would soon consult formally with the Service in connection with the pending relicensing. 962 F.2d at 33. Thus, *Platte River* dealt only with the temporary extension of existing dam operations and their impacts; formal consultation was imminent and would consider any changes needed to insure no jeopardy to listed species. Here, however, the status quo is not being continued temporarily, but is being fundamentally altered,

and the decision is of indefinite duration, rather than transitory.[8]

III. EPA'S CONTENTION IS INCONSISTENT WITH THE PURPOSES OF SECTION 7(a)(2) AND THE CENTRAL ROLE OF THE INTERAGENCY CONSULTATION PROCESS IN RESOLVING APPARENT CONFLICTS

A. The Purposes Of The ESA Would Be Frustrated By EPA's Contention

EPA's effort to create an exception not found in the plain language of Section 7(a)(2) would frustrate the purposes of the ESA. Those purposes are to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and a "program for the conservation of such ... species." 16 U.S.C. §1531(b). The purpose of "conserving" such species can only be met by "bring[ing] any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," *i.e.*, to the point at which a species has recovered and can be removed from the official list of such species. *Id.* §1532(3).

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[8] It is also unclear whether *Platte River* even dealt with Section 7(a)(2). In a pivotal sentence, the DC Circuit reasoned that "the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." 962 F.2d at 34 (emphasis in original). However, the phrase "utilize their authorities" appears only in Section 7(a)(1), 16 U.S.C. §1536(a)(1), which imposes affirmative duties of federal agencies to further the conservation of listed species. Whether or not Section 7(a)(1) expands agency powers is irrelevant to Section 7(a)(2) which clearly restricts *how* federal agencies carry out the activities they are empowered to undertake.

Section 7(a)(2) is central to these purposes for several reasons. First, it is the ESA's *only* mechanism for ensuring against the destruction or adverse modification of areas designated as "critical habitat" because they are "essential to the conservation" of a listed species. 16 U.S.C. §1533(5). When Congress enacted the ESA, critical habitat was one of its innovations, and yet the only regulatory consequence that attaches to critical habitat does so through Section 7(a)(2). Second, for plants, which comprise most of the listed species in the United States,[9] Section 7(a)(2) is generally the *only* significant mechanism in the ESA to guard against deleterious activities.[10]

Finally, that Congress viewed Section 7(a)(2) as critical to accomplishing the ESA's goals is evident from the extraordinary procedures required to secure relief from it. Whereas the taking prohibition in Section 9 can be waived simply by means of a permit issued by the Service for any "otherwise lawful activity," 16 U.S.C. 1539(a)(1)(B), waiver of the prohibitory duties of Section 7(a)(2) is only available in the event of a Presidentially declared major disaster, 16 U.S.C. §1536(p), a finding of the Secretary of Defense that a waiver is "necessary for reasons of national security," 16 U.S.C. §1536(j), or as a result of a determination on the record by a super-majority of a specially constituted committee of Cabinet-level officials that the activity for which the waiver is sought "is of regional or national significance" and has no reasonable and prudent alternative. 16 U.S.C. §1536(h). No other duty imposed by any other

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[9] See http://ecos.fws.gov/tess_public/Boxscore.do (visited March 18, 2007). As of March 18, 2007, of the 1310 endangered or threatened species in the United States, 744 were plants.

[10] Although Section 9 of the ESA, 16 U.S.C. §1538, broadly prohibits the "taking" of endangered fish or wildlife, this prohibition does not extend to plants. Instead, plants are afforded substantially less protection. Compare 16 U.S.C. §1538(a)(1)(B) with 16 U.S.C. §1538(a)(2)(B).

provision of the ESA requires such extraordinary procedures to secure an exemption from it, yet EPA's contention would effectively exempt an entire class of federal activities of indeterminate scope[11] from this core requirement of the ESA.

To achieve the far-reaching purposes of the ESA, Congress was as encompassing and inclusive as it possibly could have been throughout the law. For example, there are no limitations on the plants and animals potentially subject to the ESA's protection. They include "any member of the animal kingdom, including without limitation any mammal, fish, bird ..., amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate," as well as "any member of the plant kingdom." 16 U.S.C. §1532(8) and (14). By including all invertebrates and plants, Congress went well beyond any earlier federal conservation law. M. Bean, *The Evolution of National Wildlife* Law (1st ed. 1977) at 445-46. Neither are there are any limitations on the persons subject to the ESA's requirements. They include an exhaustive list of natural, corporate, and governmental "persons" as well as "any other entity subject to the jurisdiction of the United States." 16 U.S.C. §1532(13). There are no limitations on the federal agencies subject to the ESA's duties. They include "any department, agency, or instrumentality of the United States," regardless of whether they manage land or have other environmental responsibilities. *Id.* §1532(7).

Like the examples just cited, Section 7(a)(2) is similarly all-encompassing, applying to "each federal agency" and to "any action authorized, funded, or carried out" by that agency. Here, however, the government contends that when Congress said "any action," it really meant "some actions."

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[11] As EPA itself notes, "it may require significant factual or legal analysis to determine whether a potential effect on listed species is properly attributable to an action mandated by Congress or to a related discretionary judgment." EPA Br. at 44.

That contention is not only contrary to the plain meaning of Section 7(a)(2), but would frustrate the far-reaching purposes of the ESA by excluding from its reach an expansive category of federal actions.

B. EPA's Position Undermines the Pivotal Role That Congress Intended the Interagency Consultation Process to Play in Resolving Seeming Conflicts

1. The Role of the consultation process is not simply to identify potential conflicts, but to seek out ways to avoid them, which it has largely done successfully.

Compliance with the prohibitory duty of Section 7(a)(2) is facilitated through a process of "consultation" between the "action agency" that authorizes, funds, or carries out the action and the Service. Consultation is not simply a means of determining whether a federal action transgresses the statutory prohibition. It is also, and more importantly, a mechanism to explore fully the opportunity to reconcile seeming conflicts between the survival imperatives of affected species and the objectives of a particular federal action. Congress, particularly since its substantial revision of the consultation process in 1978, has regarded that process as the lynchpin to the success of Section 7.

When Congress enacted the ESA, Section 7 was one of its most significant changes from earlier legislation. M. Bean & M. Rowland, *The Evolution of National Wildlife Law* (3rd ed. 1997) at 199. From the beginning, Section 7's duties were to be accomplished "in consultation" with the Service. The original Act did not further elaborate on the nature of this consultation duty. In 1978 and 1979, following this Court's decision in *TVA v. Hill*, Congress emphatically affirmed the pivotal role that consultation was to play in the

workings of Section 7. Most importantly, the consultation process was to provide for a searching inquiry not only into the consequences of proposed federal actions, but also into any reasonable and prudent alternative that could avoid the prohibited impact of jeopardizing the continued existence of any listed species, or destroying or adversely modifying its critical habitat. See 16 U.S.C. §1536(b)(3) and (4). To ensure the integrity of the consultation process and to ensure that action agencies consulted in good faith, Congress prohibited them from making any irreversible or irretrievable commitment of resources that had the effect of foreclosing the formulation or implementation of reasonable and prudent alternative measures. ESA §7(d), 16 U.S.C. §1536(d). This requirement was taken directly from the Services' 1978 regulations, clear evidence that Congress was fully aware of them. See 50 C.F.R. §402.04(a)(3) at 43 Fed. Reg. 875 (Jan. 4, 1978).

The process by which federal agencies comply with Section 7(a)(2) is straightforward and can terminate at any of three stages: (1) upon a unilateral determination by the action agency that its proposed action will not affect any listed species or critical habitat; (2) upon a determination by the action agency, following "informal consultation," that its action is "not likely to adversely affect" any such species or habitat, provided the Service concurs therewith; or (3) upon issuance by the Service, following "formal consultation," of a biological opinion that evaluates whether the proposed action, or any reasonable and prudent alternative to it, complies with Section 7(a)(2)'s duty to insure no jeopardy to species or adverse modification of critical habitat. See 50 C.F.R. §402.14. In general, it has been extremely rare for any proposed federal action to proceed through all three steps of the compliance process only to meet with a negative biological opinion that identifies no reasonable and prudent alternatives within the authority of the action agency. The formal consultation process between action agencies and the Service has generally been quite successful in identifying

reasonable and prudent alternatives that allow action agency objectives to be met without jeopardizing the continued existence of listed species or adversely modifying their critical habitats.[12] Likewise, in the informal consultation process that comprises the second stage above, action agencies often adopt modifications or compensatory measures as part of their proposed actions to eliminate any likelihood that the actions will adversely affect listed species or critical habitat.

That, in fact, is what EPA did in *American Forest & Paper Ass'n v. United States EPA*, 137 F.3d 291 (5th Cir. 1998). In that case, EPA never got to the third step of the compliance process; it never formally consulted with the Service or secured from it a biological opinion that examined the proposed transfer of permitting authority to Louisiana. Instead, as the Fifth Circuit's opinion makes clear, "EPA devised" a scheme whereby, in exchange for transferring permitting authority to Louisiana, EPA secured the state's

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[12] The House report on the 1982 ESA amendments noted that "the consultation provisions have functioned extremely well as a means whereby potential conflicts between the conservation of [listed] species and the carrying out of Federal activities can be avoided." H.R. Rep. No. 97-567, at 24 (1982), *reprinted* in 1982 U.S.C.C.A.N. at 2824. During floor debate, Rep. Forsythe reported that "in the last 3 fiscal years ... there have been 10,762 consultations conducted under the Endangered Species Act. Of those, ... only 192, 1.8 percent, resulted in a finding that the project in question would jeopardize the continued existence of an endangered species. Of those 192 projects, modifications were made in 185 and they went forward. Only seven projects in 3 years were stopped, and I would point out that of those seven at least five, and perhaps all seven, were stopped for reasons unrelated to the Endangered Species Act." 128 Cong. Rec. 12958 (June 8, 1982). For similar, more recent statistics, see T. Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin*, vol. 24, no. 6 at 10-11 (Nov./Dec. 1999), www.fws.gov/endangered/esb/99/11-12/10-11.pdf (visited March 18, 2007).

consent that if the state failed to satisfy the Service's endangered species concerns with respect to particular permits, EPA would veto those permits. 137 F.3d at 294. EPA's adoption of this procedure was not the result of formal consultation with the Service, for there was none. Rather, "public comments ... prompt[ed] EPA to adopt" it. *Id.* at 296.

This procedural history of *American Forest* is important because it clarifies the issue that the Fifth Circuit actually had before it. EPA, *without benefit of formal consultation with the Service*, modified its original proposed action in a way that it thought would meet the "not likely to adversely affect" test of the second stage of the compliance process. The Fifth Circuit held that EPA's conditioning of its approval upon Louisiana's consent to the scheme described above exceeded EPA's statutory authority. However, because no formal consultation ever took place, EPA and the Service never undertook the exhaustive examination of *all* potential alternatives to reduce the likelihood of jeopardy that a formal consultation would have required. That the one measure chosen by EPA after informal consultation to justify its "not likely to adversely affect" determination exceeded its authority does not mean that there were no other permissible measures that might have been identified though formal consultation. Put differently, even if, as the Fifth Circuit asserted, "EPA lacks authority to modify the plain language of the CWA by adding to the list of enumerated requirements,"[13] there may be other measures EPA can

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[13] Id. at 298, n. 6. In reaching this conclusion, the Fifth Circuit reasoned that although CWA §402(b)(6), 33 U.S.C. §1342(b)(6), allows EPA to veto a state permit based on the Secretary of Army's concerns regarding anchorage and navigation, "Congress could have, but did not, grant EPA an analogous veto power to protect endangered species." Id. at 298. Regarding both this section and CWA §304(i), 33 U.S.C. §1314(i), which authorizes EPA to issue regulations governing the approval process for state programs, the court drew support for its conclusion from the fact

undertake that would satisfy the requirements of Section 7(a)(2). Indeed, it is the purpose of formal consultation to explore whether there are such alternatives. The Fifth Circuit opinion should not be understood to presuppose the outcome of a formal consultation process that had never occurred.

Yet, that is in effect the interpretation EPA advances here. Indeed, EPA goes beyond *American Forest* by asserting that the transfer of permitting authority to a state *never* need proceed past the first stage of the compliance process because such transfers do not meet the "may affect" test of that stage. That contention not only goes beyond *American Forest*, but it goes beyond any position previously taken by EPA in connection with any previous transfer of permitting authority.[14]

The practical consequence of the government's position that "non-discretionary" federal actions lie wholly outside the reach of Section 7(a)(2) is that any agency that thinks it has no discretion but to carry out an action will never get past Step One of the compliance process. There can be no serious doubt that TVA, for example, believed it had no discretion but to forge ahead with the completion of Tellico Dam.

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that "neither section even mention[s] endangered species or the ESA." Id. It would have been remarkably prescient had Congress done so, since the ESA had not yet been enacted.

[14] Although prior to 1993 the transfer of NPDES permitting authority was accomplished without consultation, the record does not reveal the basis for this fact. For 30 states, permitting authority was transferred either prior to enactment of the ESA or before there were any regulations implementing the Section 7 consultation process. As of 1993, however, following the significant expansion of the NPDES program caused by the requirement for stormwater discharge permits, EPA consulted on all transfers of NPDES permitting authority. For none of the pre-1993 transfers does the record reveal whether EPA made threshold "may affect" determinations or, if it did, what the basis for those determinations was.

Because Step One determinations are made unilaterally by action agencies that need neither notify nor solicit the views of the Service on those determinations, the rule advocated by the government here will create a powerful incentive for agencies to self-characterize their actions as non-discretionary and thus bypass the consultation process that Congress deemed central to accomplishing the purposes of the ESA.

2. EPA's position ignores the authorities it has that could reduce the likelihood of prohibited impacts

Petitioners make much of the fact that, as originally enacted, Section 7 required federal agencies to "utilize their authorities in furtherance of the purposes of" the ESA by "insur[ing] that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of listed species or destroy or modify their critical habitats. Petitioners assert that the reference to "utiliz[ing] their authorities" was intended by Congress to continue to apply to the duties now set forth in Section 7(a)(2), even though that language appears in Section 7(a)(1) and not in Section 7(a)(2). But *even if those words were part of Section 7(a)(2)*, they would not support the Petitioners' position here. Where Petitioners err is in construing those words confine the inquiry under Section 7(a)(2) to the precise authority for the action in question. Instead, they should be read less myopically to require inquiry into all of the authorities that an agency may have to reduce the likelihood of its action having a prohibited impact.

Even if the CWA requires EPA to approve the transfer of permitting authority to a state that meets the CWA criteria, and even if Section 7(a)(2) of the ESA confers no additional authority upon EPA to condition or qualify its transfer, the requirements of Section 7(a)(2) still apply to EPA's action. Unlike in *Public Citizen*, where no purpose would have been served by requiring FMCSA to prepare an

environmental impact statement explaining the effects of a decision already made, the requirements of Section 7(a)(2) are not nullified even if a particular decision is mandated, for they affect *how* that decision is carried out.

Applying the consultation requirement of Section 7(a)(2) here will serve the salutary intended purpose of exploring all means within EPA's authority to reduce the likelihood of jeopardizing the continued existence of any listed species. EPA's transfer decision, after all, triggers a continuing duty on it to oversee the administration of the state program. CWA §402(c), 33 U.S.C. §1342(c). Moreover, EPA may object to the issuance of individual permits that it deems to be "outside the guidelines and requirements" of the CWA. CWA §402(d), 33 U.S.C. §1342(d).[15] Consultation between EPA and the Service at the time of transfer can and should explore how EPA will exercise its oversight and permit objection authorities to reduce the likelihood that the continued existence of any threatened or endangered species will be jeopardized as a result of the transfer of NPDES authority. EPA and the Service might, for example, agree upon a special set of procedures they will jointly employ to provide special scrutiny to permits in particular areas, or permits associated with particular types of projects. Such special procedures could supplement EPA's general expertise with the Service's particular biological expertise regarding the requirements of

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[15] The regulations that implement Section 7(a)(2) define "Effects of the action" to include "direct and indirect effects of an action" as well as "the effects of other activities that are interrelated or interdependent with that action." "Interrelated actions" refer to "those that are part of a larger action and depend on the larger action for their justification." "Interdependent actions" refer to actions "that have no independent utility apart from the action under consideration." 50 C.F.R. §402.02. EPA's post-delegation oversight activities are interdependent upon its delegation action, inasmuch as they have no independent utility without the delegation.

listed species. Indeed, special procedures such as these were typically agreed upon as a result of the consultations that took place with respect to the six states to which permitting authority has been transferred since 1993.[16]

3. If a truly irresolvable conflict exists, the exemption process is the required means of addressing it.

EPA relies heavily upon *American Forest* for the proposition that Section 7(a)(2) merely "channels" existing agency authority in a particular direction. This description fundamentally mischaracterizes the role and function of Section 7(a)(2), which both guides how agencies carry out their various authorities and ultimately serves as a barrier to or restraint upon what federal agencies could otherwise do. *TVA v. Hill* did not "channel" TVA's authority into building dams with permanently open gates. Rather it prevented TVA from using its authority to close the gates on a nearly completed dam that threatened to extirpate an endangered fish.

Congress recognized, as a result of *TVA v. Hill*, that there would on occasion be situations in which no reasonable and prudent alternative to a proposed federal action meets the requirements of Section 7(a)(2). When such irresolvable conflicts exist, Congress established a special process by which federal actions that conflict with Section 7(a)(2) may

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[16] Petitioner National Association of Home Builders argues in its brief (p. 11) that when these consultations took place "EPA did not acknowledge that it was legally obligated" to consult, but was free to do so voluntarily. But what purpose does voluntary consultation serve unless, as a result of such consultation, steps are identified that would tend to reduce the likelihood of adverse impact to listed species? And if EPA can undertake those steps following voluntary consultation, it can do so as a result of consultation required by Section 7(a)(2).

be exempted therefrom. If EPA lacks the authority to implement any alternative that is consistent with Section 7(a)(2), it may proceed with its action only by securing an exemption through Section 7(h), 16 U.S.C. §1536(h).

Because the consultation process has almost always avoided irresolvable conflicts, the exemption process has rarely been used. Nevertheless, a seven-member "Endangered Species Committee" can grant exemptions if at least five of its members determine that the benefits of the action for which exemption is sought "clearly outweigh the benefits of alternative courses of action" that preserve the species. 16 U.S.C. §1536(h)(1)(A)(ii). Congress intended that in making this determination the Committee would consider alternatives *outside* the action agency's authority. As explained by Senator Culver, the floor manager in the Senate of the bill (S. 2899) that created the Committee, "[i]n reviewing available alternatives to the action under review, the committee would be charged to examine the benefits of all available alternatives, *not simply those which are within the agency's jurisdiction.*" 124 Cong Rec. S10896 (daily ed. July 17, 1978), *reprinted* in A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1978, 1979, and 1980 at 962-63 (1982, emphasis added). See also 50 C.F.R. §§450.01 and 453.03(a)(1)(ii) (Committee may consider alternatives, "including both no action and alternatives extending beyond ... acting agency jurisdiction"). Thus, even when an agency has no authority to do anything to avoid conflict with its duty to insure no jeopardy, it remains subject to Section 7(a)(2) and can avoid its restraining effect only by securing an exemption.

IV. EPA'S CONTENTION THAT NON-DISCRETIONARY FEDERAL ACTIONS ARE NOT SUBJECT TO SECTION 7(a)(2) WOULD HAVE UNANTICIPATED NEGATIVE CONSEQUENCES FOR FEDERAL AGENCIES

EPA's contention that non-discretionary actions are not subject to Section 7(a)(2) could have troubling ramifications for federal agencies generally. In particular, agencies and their officials carrying out putatively "non-discretionary" actions could be liable for civil or criminal penalties, or subject to injunction, for violating the ESA's taking prohibition without the authorization provided by Section 7(o)(2), 16 U.S.C. §1536(o)(2).

Those consequences stem from the interplay between Section 7(a)(2) and the prohibition against "taking" endangered fish or wildlife in Section 9(a)(1)(B), 16 U.S.C. §1538(a)(1)(B). As Justice Scalia noted in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 724 (1995), these provisions "do *not* operate in separate realms; federal agencies are subject to *both*, because the 'person[s]' forbidden to take protected species under [Section 9] include agencies and departments of the Federal Government." (Scalia, J., dissenting; emphases in original). Indeed, as Justice Scalia further noted in *Bennett v. Spear*, 520 U.S. 154, 172 (1997), an action agency that takes a listed species exposes its employees to "substantial civil and criminal penalties" because "persons" subject to the Act explicitly include not only agencies and departments of the Federal Government, but "any officer, employee, [or] agent" thereof. 16 U.S.C. §1532(13).

The fact that federal agencies are subject to both provisions prompted 1982 amendments that provided relief from the taking prohibition in certain circumstances. Congress's concern was expressed as follows in the House Committee Report:

> "After complying with the rigorous demands of the Section 7 consultation process, the applicant or Federal agency receives no assurance that any incidental and unintentional takings contemplated under a

> Section 7 consultation will not be prosecuted under Section 9 which prohibits any taking."

H. Rep. No. 97-567, 97th Cong., 2d Sess. at 15 (1982), *reprinted* in 1982 U.S.C.C.A.N. 2815; see also S. Rep. No. 97-418, 97th Cong., 2d Sess. at 21-22 (1982). Congress remedied this dilemma with amendments embodied in Section 7(b)(4) and 7(o)(2), 16 U.S.C. 1536(b)(4) and 1536(o)(2). The former provides that if the Service concludes, after consultation, that the federal action would not violate Section 7(a)(2) but may result in the incidental taking of a listed species, the Service must include in its biological opinion "reasonable and prudent measures" to minimize the impact of such incidental taking. The latter provides that any taking that is in compliance with such reasonable and prudent measures shall not be considered a prohibited taking.

Unless federal actions undergo formal consultation, there may be no means of securing for them relief from the ESA's taking prohibition. Section 10(a)(1)(B) of the ESA, 16 U.S.C. 1539(a)(1)(B), authorizes permits to take listed species incidental to otherwise lawful activities, but it is well established that permits under this provision are not available to federal agencies.[17] Section 7(b)(4) and Section

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[17] In explaining the new permitting provision of Section 10(a)(1)(B) in 1982, the House floor manager of bill characterized it as "involv[ing] permits for the taking of endangered species when no other Federal action is involved." 128 Cong. Rec. 26188 (Sept. 30, 1982, remarks of Rep. Breaux). Under the heading, "Who Can Apply for a Section 10 Permit?" the Services' *Habitat Conservation Planning Handbook* , available at www.fws.gov/endangered/hcp/hcpbook.htm (visited March 21, 2007), explains that "Section 10 permits can be issued to state, municipal, or tribal governments, corporations or businesses, associations, and private individuals. They can be issued to entities that are a combination of these, such as joint power authorities, watershed councils, and other planning authorities." Handbook at 3-1. In short, Section 10(a)(1)(B)

10(a)(1)(B) thus provide mutually exclusive mechanisms to authorize incidental take: the former for federal actions and the latter for non-federal actions. The idea that there might be some federal actions not subject to Section 7 – *i.e.*, those EPA characterizes as non-discretionary – clearly never occurred to Congress. If EPA's view is correct, then federal agencies can never secure authorization to take listed species when carrying out non-discretionary actions, because those actions cannot be the subject of a biological opinion – the only mechanism by which federal agencies can receive authorization for such take. That Congress never contemplated such an inexplicable result is certain, yet it is precisely the result that flows from the legal proposition that EPA asserts here.

CONCLUSION

The judgment below should be affirmed and the case remanded for further proceedings consistent with the requirements of Section 7(a)(2) of the ESA.

Respectfully submitted.

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permits are available to anyone except federal agencies. The Handbook continues: "The standard method for authorizing take for Federal agencies is through the Section 7 consultation process. Actions authorized, funded, or carried out by Federal Agencies *must go through the Section 7(a)(2)consultation process*" (emphasis added). *Id.* at 3-1 to 3-2.